Office-Supreme Court, U.S.
FILED
AUG 19 1981
ALEXANDER L. STEVAS,
CLERK

No. 81-47

# In the Supreme Court of the United States

OCTOBER TERM, 1980

IMELDA CONTRERAS DE AVILA, ET AL., PETITIONERS

*v.*

WILLIAM FRENCH SMITH, ET AL.

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT*

**BRIEF FOR THE RESPONDENTS IN OPPOSITION**

REX E. LEE
*Solicitor General*

D. LOWELL JENSEN
*Assistant Attorney General*

LAURI STEVEN FILPPU
*Attorney*

*Department of Justice*
*Washington, D.C. 20530*
*(202) 633-2217*

## QUESTION PRESENTED

Whether the court of appeals properly concluded that the Department of State adopted a reasonable interpretation of the visa allocation laws governing the Western Hemisphere in fiscal year 1977.

TABLE OF CONTENTS


Page

Opinions below ..... 1

Jurisdiction ..... 1

Statutes involved ..... 1

Statement ..... 2

Argument ..... 4

Conclusion ..... 10


TABLE OF AUTHORITIES


Cases:

*Udall* v. *Tallman*, 380 U.S. 1 ..... 4

Statutes:

Act of Oct. 3, 1965, Pub. L. No. 89-236, Section 21(e), 79 Stat. 921 ..... 2

Fiscal Year Transition Act, Pub. L. No. 94-274, 90 Stat. 389 ..... 9

Immigration and Nationality Act, 8 U.S.C. 1101 *et seq.* :

- Section 201(a), 8 U.S.C. 1151(a) ..... 2
- Section 202(a), 8 U.S.C. 1152(a) ..... 1, 2, 4, 6, 9
- Section 203(a), 8 U.S.C. 1153(a) ..... 4
- Section 203(a)(1)-(8), 8 U.S.C. 1153(a)(1)-(8) ..... 6
- Section 203(a)(8), 8 U.S.C. 1153(a)(8) ..... 6

Immigration and Nationality Act Amendments of 1976, Pub. L. No. 94-571, 90 Stat. 2703-2707 ..... 2, 3, 4, 5, 6, 9

Page

Statutes—(Continued):

Section 9(b), 90 Stat. 2707 ..... 6

Refuges Act of 1980, Pub. L. No. 96-212, Section 203(b), 94 Stat. 107 ..... 1

Miscellaneous:

119 Cong. Rec. 31456-31464 (1973) ..... 7

119 Cong. Rec. 31457 (1973) ..... 7

H.R. Rep. No. 94-1553, 94th Cong., 2d Sess. (1976) ..... 7

# In the Supreme Court of the United States

OCTOBER TERM, 1980

No. 81-47

IMELDA CONTRERAS DE AVILA, ET AL., PETITIONERS

*v.*

WILLIAM FRENCH SMITH, ET AL.

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT*

## BRIEF FOR THE RESPONDENTS IN OPPOSITION

### OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-14a) is reported at 643 F. 2d 471. The opinions and orders of the district court (Pet. App. 15a-56a) are not reported.

### JURISDICTION

The judgment of the court of appeals was entered on March 10, 1981. A petition for rehearing was denied on June 8, 1981 (Pet. App. 57a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

### STATUTES INVOLVED

1. At all times relevant to this case, Section 202(a) of the Immigration and Nationality Act, 8 U.S.C. 1152(a),[1] provided:

[1]This statute has been amended by the Refugee Act of 1980, Pub. L. No. 96-212, Section 203(b) 94 Stat. 107.

No person shall receive any preference or priority or be discriminated against in the issuance of an immigrant visa because of his race, sex, nationality, place of birth, or place of residence, except as specifically provided in sections 1101(a)(27), 1151(b), and 1153 of this title: *Provided,* That the total number of immigrant visas and the number of conditional entries made available to natives of any single foreign state under paragraphs (1) through (8) of section 1153(a) of this title shall not exceed 20,000 in any fiscal year.

2. The Immigration and Nationality Act Amendments of 1976, Pub. L. No. 94-571, 90 Stat. 2703-2707, are set forth at Pet. App. 58a-65a.

## STATEMENT

This case was brought as a class action by Mexican immigrant visa applicants and their relatives who claim that the Department of State under-allocated immigrant visas to natives of Mexico during fiscal year 1977. Petitioners contend that the Department of State misconstrued part of the 1976 Amendments to the Immigration and Nationality Act, and they seek to have 13,366 unused Western Hemisphere immigrant visa numbers from fiscal year 1977 made available to those Mexicans who are currently on the immigrant visa waiting list (Pet. App. 1a-2a).

1. The 1976 Amendments to the Immigration and Nationality Act became effective on January 1, 1977, three months after the start of fiscal year 1977. Prior to those Amendments there was no numerical limitation on immigration from Western Hemisphere nations, except for the overall annual hemispheric limit of 120,000. Act of Oct. 3, 1965, Pub. L. No. 89-236, Section 21(e), 79 Stat. 921. In contrast, immigration from Eastern Hemisphere nations was subject to both an overall limit of 170,000 and a 20,000 per-country limitation that applied on a fiscal year basis. 8 U.S.C. 1151(a), 1152(a).

The 1976 Amendments imposed a 20,000 per-country quota on Western Hemisphere nations. While the 20,000 per-country limit operates on a fiscal year basis, the 1976 Amendments took effect after one-quarter of the fiscal year had elapsed, and Congress failed to specify how that newly imposed 20,000 limit should be applied during an ongoing fiscal year.

Relying mainly on the legislative history of the 1976 Amendments, the Department of State counted all numerically restricted Western Hemisphere visas issued in fiscal year 1977—including those issued in the first quarter of that fiscal year—against the 20,000 limit. This enabled the Department of State to make the transition from one system to another and to determine the distribution of those visas that had not been issued as of January 1, 1977. Because Mexicans had received over 14,000 visas during the first quarter of fiscal year 1977, under the State Department's construction of the law they received less than 6,000 visas during the remaining three quarters of that fiscal year.

2. On March 29, 1978, petitioners filed this class action for injunctive and declaratory relief in the United States District Court for the Northern District of Illinois, alleging that the Department of State had improperly restricted Mexican immigration during the nine months of fiscal year 1977 following the January 1, 1977 effective date of the 1976 Amendments. Contending that the State Department should have issued 20,000 visas to Mexican visa applicants during that nine-month period, petitioners moved for class certification and for summary judgment. The district court certified a class that includes all current Mexican visa applicants, and ruled that the State Department had underallocated immigrant visas for use by Mexicans in the nine-month period in question (Pet. App. 15a-35a). The court concluded that the 20,000 limit should have been prorated for the pertinent nine months of fiscal year 1977,

entitling Mexicans to 15,000 visas during that period. It accordingly ordered the issuance of an additional 9,565 visas to Mexicans (15,000 minus the number actually issued by the State Department during those nine months).

The court of appeals reversed, concluding that the Department of State had reasonably interpreted and applied the visa allocation laws in fiscal year 1977 (Pet. App. 1a-14a).

## ARGUMENT

The decision of the court of appeals does not warrant review. Although this case affects a sizeable number of aliens, it involves a narrow issue of statutory interpretation that is incapable of recurring because it concerns only a discrete time period. There is no conflict on the issue among the circuits, and, because this case was certified as a class action, no future conflict can develop.

Moreover, the decision of the court of appeals is correct. It properly defers to the agency's reasonable interpretation of a statute that it is charged with administering. See *Udall* v. *Tallman*, 380 U.S. 1, 16 (1965).

1. Prior to January 1, 1977, different visa allocation systems applied to applicants from the Eastern and Western Hemispheres. Eastern Hemisphere immigration was limited to 170,000 each fiscal year. However, a system of preferences allowed certain relatives, workers with needed skills, and refugees to receive special consideration. See 8 U.S.C. 1153(a). Visas issued under this preference system, as well as visas issued to applicants in a nonpreference category, were subject to the 20,000 per-country limit of 8 U.S.C. 1152(a). The preference system and the 20,000 per-country limit did not apply in the Western Hemisphere, which had an overall 120,000 fiscal year quota, and in which immigration was on a hemisphere-wide "first come-first served" basis. The 1976 Amendments equalized the treatment of aliens from both

hemispheres by, among other things, making the preference system available to Western Hemisphere applicants and imposing the 20,000 per-country limit.

The 120,000 overall Western Hemisphere limit had been in effect since 1968. By January 1, 1977, the effective date of the 1976 Amendments, there was a large backlog of Western Hemisphere visa applicants. Thus, following enactment of the 1976 Amendments, the Department of State anticipated full usage of the 120,000 hemispheric maximum regardless of how the new 20,000 per-country quota would be applied in fiscal year 1977.[2] Although a number of factors ultimately prevented the non-Mexican consular posts from processing the entire anticipated increase in applicants,[3] the State Department adopted its challenged construction of the law in the belief that it was allocating a finite number of visas among a much larger group of visa applicants.

The 1976 Amendments required the Department of State to change from one visa distribution system to another in the middle of a fiscal year. There was, however, no specific congressional directive on how to accomplish the transition. Three alternatives existed: (1) to apply the 20,000 limit to all visas issued during the fiscal year, the approach chosen by the State Department; (2) to prorate the 20,000 limit for three-fourths of the fiscal year then remaining, the approach selected by the district court; or (3) to make 20,000 visas available to applicants from each country during the three-quarters of the fiscal year following January 1, 1977, the alternative advanced by petitioners.

---

[2]August 1978 Deposition of Cornelius D. Scully, III, at 64-65, II-49 to II-50.

[3]R. Item 43, Exhibit 1.

Three factors led the Department of State to resolve the statutory ambiguity as it did.[4] First, the 120,000 hemispheric limit was unchanged by the 1976 Amendments. Thus, there was no suggestion that Congress intended the three quarters of the fiscal year from January 1, 1977 to September 30, 1977, to be treated as if it were a separate fiscal year, or otherwise to be disassociated from the first quarter that had preceded the effective date of the 1976 Amendments.

Second, the State Department had adopted a "first come-first served" approach to Western Hemisphere visa processing by analogy to the processing of nonpreference Eastern Hemisphere applicants under 8 U.S.C. 1153(a)(8). That analogy was recognized by Congress in the savings clause to the 1976 Amendments, Section 9(b), Pub. L. No. 94-571, 90 Stat. 2707, which gave nonpreference status to those Western Hemisphere aliens who remained on the visa waiting list when the 1976 Amendments took effect. This suggested that the visas issued during the first quarter of fiscal year 1977 could be construed as the functional equivalent of nonpreference visas. Charging those visas against the new 20,000 limit would thus be in keeping with the spirit of 8 U.S.C. 1152(a), which makes both preference *and nonpreference* visas subject to the 20,000 limit.[5]

Third, and most importantly, the legislative history showed conclusively that Congress intended that applicants

---

[4]See 1978 Scully Deposition, *supra*, at 47-49.

[5]Petitioners' repeated assertion (Pet. 4, 9, 10, 11) that the 20,000 per-country limit applied only to preference applicants is incorrect. Section 202(a) of the Act, 8 U.S.C. 1152(a), provided that "the total number of immigrant visas * * * made available to natives of any single foreign state under paragraphs (1) through (8) of section 1153(a) of this title shall not exceed 20,000 in any fiscal year." The referenced paragraphs of Section 203(a), 8 U.S.C. 1153(a)(1)-(8), include the preference categories as well as a residual, nonpreference category (see Pet. App. 5a n.7).

from each nation in the world be limited to the 20,000 maximum in each fiscal year. Congress knew that Mexico had been using over one-third of the 120,000 hemispheric limit prior to 1977. See, *e.g.*, 119 Cong. Rec. 31457 (1973) (remarks of Rep. Keating). Moreover, in considering legislation similar to the 1976 Amendments, the House of Representatives had specifically rejected an amendment giving Mexico a 35,000 annual ceiling. See 119 Cong. Rec. 31456-31464 (1973). Finally, the House Report accompanying the 1976 Amendments states:

> The decision by this Committee to limit all countries to 20,000 has been based primarily on the desire that this legislation mark the final end of an immigration quota system based on nationality, whether the rationale behind it be the alleged national origins of our citizenry, as it was in the past, or geographical proximity—the argument previously advanced for preferential treatment of Canada and Mexico. The proposed legislation rejects the concept of a "special relationship" between this country and certain other countries as a basis for our immigration law, in favor of a uniform treatment for all countries.

H.R. Rep. No. 94-1553, 94th Cong., 2d Sess. 9 (1976).

The State Department's interpretation, which was upheld by the court of appeals, is thus consistent with the purpose of the per-country quota. The challenged interpretation simply prevented Mexicans from using more than their share of the visas authorized for issuance in fiscal year 1977.

Under petitioners' "plain meaning" interpretation of the statute (Pet. 16), on the other hand, Mexican aliens would have been allowed to receive 20,000 visas during only three-quarters of the fiscal year. The court of appeals correctly recognized (Pet. App. 11a) that this approach is the "poorest choice" among the possible interpretations of the

statute. Under this approach, about 34,000 visas would have been allocated to Mexicans in fiscal year 1977, a result that is contrary to Congress' rejection of any special treatment for natives of Mexico.

2. The State Department applied its interpretation of the law to every country in the Western Hemisphere. Mexico was not singled out for special treatment. While the Department's approach did restrict Mexican immigration, any application of the 20,000 per-country limit was bound to reduce the number of immigrants from Mexico, because Mexicans had historically received 40,000 to 45,000 of the overall 120,000 hemispheric visas. Moreover, consistent with the congressional intent behind the 1976 Amendments, the reduction in the level of Mexican immigration was to be offset by increased non-Mexican immigration. During the first quarter of fiscal year 1977, the State Department made available 26,886 visas to Western Hemisphere aliens. All of the visas issued during this period were charged to the 20,000 limits of the various nations involved. Mexicans had fewer than 6,000 preference visas for use during the final three quarters of the fiscal year because they had received 14,203 visas during the first quarter. The full statutory maximum of 20,000 was made available to Mexicans in fiscal year 1977 under the Department of State's construction of the law.[6]

3. Petitioners suggest (Pet. 12, 14) that the State Department's approach is contrary to the policy of family reunification. That suggestion is unfounded. It is true that the

---

[6]Furthermore, no alien who received a first-quarter visa was subjected to any disability as a result of the State Department's interpretation. The validity of those first-quarter visas was not affected by the fact that they were charged or counted against the 20,000 per-country limit. The Department of State's approach merely enabled the Department to determine the proper allocation of the remaining visas and did not interfere with the statutory rights of any visa recipient.

preference system operates, within certain limits, to unite families. But the per-country limit, which Congress made applicable to the Western Hemisphere in the 1976 Amendments, operates to preclude natives from any one country or group of countries from monopolizing the numerically restricted visas. Thus, the per-country limit frequently frustrates the policy of reunification for natives of countries with heavy visa demand; it bars the issuance of more than 20,000 visas per country, even though more family member applicants may be on the waiting list. Here, the State Department merely applied the statutory per-country limit to Mexican visa applicants.[7]

4. Congress postponed the effective date of the Amendments for about two months in order to give the Executive Branch some "lead time" in implementing the new visa allocation system in the Western Hemisphere. From this, petitioners incorrectly infer (Pet. 14-15) that Congress intended the 20,000 per-country limit to apply in its entirety during only a fraction of the first fiscal year in which the system was operational.[8]

---

[7]Petitioners inaccurately assert (Pet. 12) that "the government's interpretation did not aid any non-Mexican preference applicants in obtaining visas * * *." Under petitioners' theory, they should be entitled to 14,203 visas, the number of first-quarter Mexican visas that were charged to the 20,000 limit. Yet, they seek recovery of only 13,366 visas, because that is all that remains of the hemispheric limit from fiscal year 1977. Although the State Department expected more non-Mexicans to benefit, at least 837 did benefit (14,203 minus 13,366).

[8]Petitioners draw no support from the fact that Congress adjusted the quotas in the Fiscal Year Transition Act, Pub. L. No. 94-274, 90 Stat. 389, in anticipation of an extended fiscal year. This merely suggests that Congress knows how to legislate when it perceives that an ambiguity might arise. But here, it is apparent that Congress simply did not consider the possibility that the Amendments' effective date might not coincide with the start of a new fiscal year. That inadvertence is understandable, given the fact that Congress did not need to amend 8 U.S.C. 1152(a), the statute containing the 20,000 per-country limit, in order to make that limit applicable to the Western Hemisphere.

But Congress did not consciously select January 1, 1977 as the effective date for the Amendments. That effective date arose from the operation of the "lead time" formula, coupled with delays in enacting the legislation. The delayed implementation formula could have resulted in the statute becoming effective at the beginning of *any* month of the year. Yet, under petitioners' reasoning, if the legislative process had resulted in an effective date of September 1, Congress could be deemed to have intended the full 20,000 limit to apply for only one month. Quite obviously, no such result could be defended. The present claim can fare no better.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

REX E. LEE
*Solicitor General*

D. LOWELL JENSEN
*Assistant Attorney General*

LAURI STEVEN FILPPU
*Attorney*

AUGUST 1981

DOJ-1981-08